Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Year 2000 Biennial Regulatory Review – Amendment of Part 22 of the Commission's Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and other Commercial Mobile Radio Services	)	WT Docket No. 01-108

To: The Commission

COMMENTS OF WESTERN WIRELESS CORPORATION

WESTERN WIRELESS CORPORATION

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SUMMARY

Western Wireless Corporation ("Western") hereby files comments in response to the Commission's *Notice of Proposed Rulemaking*, FCC 01-153 (May 17, 2001) (*NPRM*), *summarized*, 66 Fed. Reg. 31,589 (June 12, 2001) in this docket.

As discussed more fully herein, Western generally supports many of the Commission's proposals to modify or eliminate certain provisions of the rules affecting cellular service. Western's comments are more particularly directed to the issue of streamlining the Commission's current rules regarding cellular unserved area application procedures.

One of the major problems with the unserved area rules is that they hinder a cellular licensee's ability to modify its existing systems to provide improved service — particularly to rural areas, which are far more likely to be unserved than urban or suburban areas. The public interest would be better served by making it easier, not harder, for carriers to bring new service to these unserved areas. Under the current rules, a carrier cannot develop a build-out plan for extending service in stages over several years with any confidence.

Western proposes that the Commission modify the current regulatory scheme by adopting a regulatory approach that closely parallels the area-wide licensing used for PCS. Western suggests that the Commission auction off the remaining unserved areas, market-by-market, with licensees being subject to general area-wide build-out benchmarks instead of having their CGSAs limited to areas covered by a particular signal strength. Within their geographic license areas, licensees would thus be able to construct new and modified sites without having to apply on a site-by-site basis.

Western generally supports the cellular technical requirements proposed by the Commission in this *NPRM*. The *NPRM* seeks comment on its proposal to amend Section 22.905

of the rules by removing the channelization plan and rewording the remainder of that section such that it sets forth only those portions of the electromagnetic spectrum that are allocated to cellular radio service. Western supports the Commission's proposal to remove the channelization plan.

The *NPRM* considers eliminating the OET 53 cellular compatibility requirements. Western agrees with the Commission's plan to eliminate the requirement that cellular systems have the capability to provide service using modulation types described in OET-53.

Section 22.367(a)(4) of the Commission's rules provides that electromagnetic waves transmitted in the Cellular Radio Services must be vertically polarized. In the *NPRM*, the Commission concludes that it should relax this requirement in Section 22.367. Western agrees with the Commission's proposal to amend this section of the rules.

In the *NPRM*, the Commission explains that the current cellular SID rules are unnecessary and that there is no public policy reason that SIDs must be a term of Cellular Radiotelephone Service authorizations. Western supports the Commission's proposal.

Under the current rules, Section 22.323 expressly authorizes cellular carriers to provide other communications services incidental to the public mobile service if certain conditions are met. Western agrees with the Commission's conclusion that the first two conditions are unnecessary and the third condition should also be deleted. Western, however, would recommend retaining an express rule permitting incidental services.

The *NPRM* suggests eliminating or substantially modifying Sections 22.937, 22.943, and 22.945 anti-trafficking rules. Western agrees with the Commission's conclusion that this rule is no longer needed.

Section 22.911(a) of the rules sets forth the standardized method of determining the cellular geographic service area ("CGSA"). Western strongly opposes this rule change.

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Western Wireless Corporation ("Western") hereby files comments in response to the Commission's *Notice of Proposed Rulemaking*, FCC 01-153 (May 17, 2001) (*NPRM*), *summarized*, 66 Fed. Reg. 31,589 (June 12, 2001) in this docket.

The NPRM seeks comment on proposals to modify or eliminate regulations primarily affecting Part 22 Cellular Radiotelephone Service ("cellular") and other Commercial Mobile Radio Services ("CMRS"), as part of the Commission's year 2000 Biennial Review of regulations as provided in Section 11 of the Communications Act ("the Act").[1] The Commission has also invited comment on the modification or elimination of other rules that affect these services.

As more fully discussed below, Western generally supports many of the Commission's proposals to modify or eliminate certain provisions of the rules affecting cellular service. Western's comments are more particularly directed to the issue of streamlining the Commission's current rules regarding cellular unserved area application procedures, in response

to the Commission's solicitation of proposals for the modification or elimination of other rules that affect these services.[2]

I. WESTERN RECOMMENDS THAT THE COMMISSION ELIMINATE CURRENT CELLULAR UNSERVED AREA RULES

In 1996, Congress amended the Communications Act to create a "pro-competitive deregulatory national policy framework."[3] To this end, the FCC's general policy has been to allow the marketplace, rather than regulation, to shape the development of wireless services.[4] A well-structured market policy is one that creates conditions that empower consumers. Overly burdensome regulatory requirements can undercut these goals by constraining markets, which ultimately affects consumers by denying or delaying service. This problem is seen most readily in the context of the FCC's current policy and procedure regarding cellular unserved application requirements.

The unserved area licensing rules, as contained in Section 22.949 of the Commission's rules, involves a complex scheme involving two phases. Under the current unserved area rules, initial cellular licensees were given five years to provide service throughout their markets.[5] Areas in the market that were left unserved by the end of this period were made available for licensing by other carriers. Unserved areas that were equal to or greater than 50 square miles in size were available for licensing to any interested party, whereas areas less than 50 square miles were available for licensing only to the incumbent licensees abutting the unserved area.[6]

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1 Section 11 of the Communications Act of 1934, as amended, 47 U.S.C. § 161.

2 *NPRM* at ¶ 1.

3 Pub.L.No. 104-104, 110 Stat. 56 (1996) ("1996 Act"); H.R. Rep. No. 104-458 at 1 (1996).

4 *Interconnection and Resale Obligations Pertaining to CMRS Services*, 11 F.C.C.R. 9462 (1996).

5 *See* 47 C.F.R. § 22.947.

6 In instances where a single licensee completely surrounded an unserved area of less than 50 square miles, FCC staff has indicated that the area is considered a "dead spot" and deemed
(continued on next page)

A. The Current Unserved Area Rules Make It Unnecessarily Difficult to Serve Rural Areas

One of the major problems with the unserved area rules is that they hinder a cellular licensee's ability to modify its existing systems to provide improved service — particularly to rural areas, which are far more likely to be unserved than urban or suburban areas. For example, if a cellular licensee wants to sectorize a rural cell on the periphery of its CGSA, it must engineer the cell to ensure that it does not encroach into unserved area, to ensure that it is a permissive change. If the modification results in a contour extending into unserved area, an unserved area application must be filed and Commission approval obtained before the change can be made. The application must be placed on public notice for 30 days and the licensee applicant must wait for the FCC to process and grant the application before implementing the modifications. Even if uncontested, an unserved area application typically takes approximately 45-60 days for grant. Likewise, if a carrier seeks to provide coverage along a highway between two towns that it currently serves or provide coverage to a new residential development near the edge of its existing service area, an unserved area application is required if providing the service will extend contours even minimally into an area not already within the carrier's CGSA.

People living and working in the parts of rural America not currently receiving cellular service are disserved by rules that place obstacles in the way of carriers seeking to extend service beyond existing boundaries. The unserved area rules impose application requirements and attendant delays for all new extensions of service into unserved territory. The public interest

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served. *See* 47 C.F.R. § 22.99 (noting that "Dead spots" are "[s]mall areas within a service area where the field strength is lower than the minimum level for reliable service" and that "[s]ervice within dead spots is presumed."). Thus, the area can be included within the licensee's service area without prior FCC approval.

would be better served by making it easier, not harder, for carriers to bring new service to unserved areas.

The unserved area process not only makes it more difficult for a rural carrier to expand its service to new areas, but its site-by-site application procedure and mutual exclusivity rules also obstruct the provision of integrated area-wide service in such areas. During Phase II, unserved area applications may be filed at any time, and mutually exclusive competing applications may be filed within 30 days after public notice of the first-filed application as being accepted for filing.[7] If such an application is filed, the license to serve the area is awarded through a competitive bidding process.[8] It can take years to schedule a cellular unserved area auction.

Under these rules, a carrier cannot develop a build-out plan for extending service in stages over several years with any confidence, because (a) an opportunistic speculator may file an application for an unserved area at any time, forcing the carrier either to forego its plans for the area altogether or file a competing, mutually exclusive application ahead of schedule, or (b) when it files an application according to plan, a speculator may file a mutually exclusive application on top of that. In either case, the carrier is unable to respond to local residents' need for service in a reasonable, timely fashion. Equally important, unnecessary uncertainties are injected into rural carriers' capital expenditure budgets due to the competitive filing process established by the unserved area regulations. The Commission should be facilitating capital investment in rural telecommunications infrastructure, but the unserved area rules make such investment more difficult.

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7 *See* 47 C.F.R. § 22.131(c)(3)(iii).

8 47 C.F.R. § 22.131(c)(4)(ii)(A).

B. A Better Approach — PCS-Style Geographic Area Licensing

In contrast to the inefficient site-by-site unserved area process used for cellular, which seems to value mutually exclusive application contests over serving the public, the Commission's rules for PCS give carriers the flexibility to build out in a reasonable manner over a period of years. Instead of their service areas being defined by the contours of their service, with all other areas being deemed unserved, PCS licensees are granted licenses covering broad geographic areas — MTAs and BTAs, subject to possible partitioning — not based on site-by-site coverage.[9] Within their license areas, PCS operators are subject to build-out benchmark requirements, the most rigorous of which requires provision of "adequate service to at least one-third of the population in their licensed area within five years of being licensed and two-thirds of the population in their licensed area within 10 years of being licensed."[10] Once they have met the build-out requirement, PCS licensees have the flexibility to extend service to additional areas within their service area without having to file site-by-site applications, without being subject to speculative applications filed by interlopers, and without being subject to competing, mutually exclusive applications when they want to serve new sections of their licensed service area.

Based on its experience with licensing broadband PCS for geographic areas, the Commission has taken steps to provide specialized mobile radio ("SMR") operators with similar geographic area licenses. In its *CMRS Third Report and Order,* the Commission found that granting geographic-area-wide SMR licenses, instead of site-by-site licenses, would serve the

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9 *See* 47 C.F.R. § 24.202.

10 47 C.F.R. § 24.203(a).

public interest.[11] The Commission then found that this would make the SMR licensing regime more like the geographic area licensing used in PCS.[12]

C. Western's Geographic Area Licensing Proposal for Unserved Areas

Western proposes that the Commission modify the current regulatory scheme by adopting a regulatory approach that closely parallels the area-wide licensing used for PCS and, with some modifications, SMR. As more fully described below, Western suggests that the Commission auction off the remaining unserved areas, market-by-market, with licensees being subject to general area-wide build-out benchmarks instead of having their CGSAs limited to areas covered by a particular signal strength. Within their geographic license areas, licensees would thus be able to construct new and modified sites without having to apply on a site-by-site basis.

Specifically, Western proposes that a one-time filing window would be opened for accepting applications for all unserved areas exceeding 50 square miles on a given frequency block in each MSA or RSA. If there is only one incumbent licensee, that licensee would not be required to file applications during this window; if another party files an application, the incumbent licensee would be given 30 days from public notice of such application to file a competing application for the unserved area, in order to participate in an auction. In such a case, all mutually exclusive applications for the unserved areas in the MSA/RSA on the particular frequency block would be subject to auction at one time. If no other party submits a MSA/RSA-

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11 *Regulatory Treatment of Mobile Services,* GN Docket 93-252, *Third Report and Order,* 9 F.C.C.R. 7988 (1994).

12 *Id.* at ¶95.

wide unserved area application during the filing window, the unserved area would automatically become part of the CGSA of the incumbent licensee.[13]

Unserved areas of less than 50 square miles in an MSA/RSA on a frequency block, however, should be automatically incorporated into the CGSA of the first-authorized incumbent licensee whose existing CGSA on that frequency block in the market adjoins the unserved area.[14] Unserved areas that cross market boundaries would be divided along the market boundary into separate unserved areas, for purposes of the foregoing provisions. Thus, a 200-square mile unserved area spanning a boundary, with 175 square miles in one market and 25 square miles in the other, would be treated as two different unserved areas, one subject to a one-time application filing and the other being incorporated into the adjacent in-market incumbent's CGSA.

The Commission should eliminate the requirement that licensees notify the Commission of each CGSA expansion. This would bring the cellular rules more in line with the PCS rules governing system build-out. At the end of the five-year build-out period, there would be a one-time filing to provide coverage data, after which time the procedures above would be followed with respect to any unserved areas. If, however, the carrier demonstrates that it has already

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[13] If there are two or more incumbent licensees with CGSAs on a particular frequency block in a given MSA/RSA (due to the presence of a prior-granted, stand-alone unserved area system), the first-authorized licensee should be treated as the incumbent as described above, giving effect to all successors in interest. Later-authorized licensees would have to file applications on the initial filing date to preserve their rights to participate in the auction. If there is more than one licensee in a particular market, the unserved area would become licensed to the first-in-time licensee. If there are two or more incumbents whose licenses were derived from the first-authorized licensee through partitioning, or who were simultaneously first-authorized as the result of a partitioning agreement, the incumbents would have to file applications.

[14] Again, the first-authorized licensee would be determined giving effect to all predecessors in interest. If there is more than one first-authorized licensee adjacent to the less-than-50-square-mile unserved area, due to partitioning (see previous footnote), in the absence of an agreement between them they would have to file applications for this unserved area.

satisfied the area-wide build-out benchmark, its license would continue to be for the entire geographic area.

Finally, the Commission should adopt an area-wide build-out benchmark similar to that applicable to 30 MHz broadband PCS, providing the licensee who acquires an MSA/RSA-wide license with 5 years in which to demonstrate that it provides an adequate level of service to 2/3 of the population in its entire service area within the market. (For an incumbent, this would include its existing in-market systems as well as the added unserved area; for a new market-wide unserved area licensee, it would apply to all areas not within the CGSAs of the incumbents on its frequency block).

Adopting this approach will significantly benefit the cellular industry and its consumers. First, the current procedures are no longer necessary given the evolution of cellular service. The current process, a five-year build-out period followed by site-by-site unserved area filings, was an appropriate way to institute a new service that was expected to be principally urban and suburban. Now, virtually all urban and suburban areas are covered, as are many rural areas. Now that carriers have covered most of the nation, only the most rural areas remain. A site-by-site process is an inefficient way to extend coverage to these areas. Area-wide licensing will give carriers the flexibility to extend service in a reasonable manner and give them incentives to plan for making their service truly universal. Second, the adoption of the proposed rule changes would decrease administrative burdens on both licensees and the FCC.

Finally, adopting this approach will create regulatory parity between cellular, PCS, and SMR services. In its *CMRS Third Report and Order,* the Commission held that its CMRS licensing rules were based on the following principles:

> (1) large Commission-defined service areas, (2) assignment of contiguous spectrum blocks to a single licensee on an exclusive

> basis, (3) use of construction and coverage requirements rather than loading requirements to ensure efficient use of spectrum, and (4) technical and operational rules that afford maximum flexibility to locate, design, construct, and modify facilities within one's licensing area, so long as no interference is caused to other licensees.[15]

The proposal outlined above achieves all of these objectives, unlike the existing site-by-site licensing regime for unserved areas.

Modifying the unserved area rules as specified above would greatly benefit the residents of isolated rural communities and those working or traveling in areas not now receiving cellular coverage. The Commission should provide incentives to cellular carriers for upgrading and expanding services into isolated rural areas.

In addition to facilitating mobile coverage in rural areas, this approach would also facilitate the use of cellular radio for the provision of fixed wireless local telephone service in areas where landline facilities are scarce and expensive to construct. Western has been a leader in offering an alternative to the incumbent local exchange carrier in isolated rural areas.[16] Western has also worked to bring telephone service, via fixed cellular technology, to communities not having adequate access to wireline facilities, such as Indian reservations.[17] By

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[15] 9 F.C.C.R. 7988 at ¶ 95.

[16] In Regent, ND, Western offered local residents an alternative to the incumbent local exchange carriers by providing wireless residential service. For a low flat fee each month, residential customers have access to extended calling areas and a flat per-minute rate for long-distance. This has significantly reduced costs to consumers. In response, the local wireline carrier now offers lower rates, an expanded calling area and new long distance rates. By allowing flexibility and easing the regulatory burden, cellular providers have greater incentive to provide an alternative service to isolated rural areas. This, in turn, benefits rural consumers by lower rates and providing improved geographic coverage. *See* Tom Wheeler, *Bridging the Digital Divide: Wireless is Providing a Competitive Choice for Consumers in Rural America*, http://www.americasne…supplement/20000201wi/wheeler.htm.

[17] For example, Western provides fixed wireless service to the Pine Ridge reservation in South Dakota.

adopting Western's proposal, the Commission would be providing a strong incentive to cellular carriers to fill out their service area to cover these underserved communities.

In summary, Western asks the Commission to adopt a new regulatory framework for managing unserved areas. Burdensome regulatory requirements have inhibited cellular carriers from expanding in geographic service areas. As explained above, detailed applications must be filed for a vast number of modifications or any time a carrier wants to add a new site. This ultimately creates a disincentive to carriers when deciding whether to expand their services into less profitable areas. The public interest would be greatly served if the Commission relaxes its unserved area rules, by providing an incentive to carriers to expand service to these areas.[18]

II. WESTERN GENERALLY SUPPORTS THE PROPOSED REVISIONS TO THE CELLULAR TECHNICAL REQUIREMENTS

For the reasons described below, Western supports the cellular technical requirements proposed by the Commission.

A. Channelization Requirements

The channelization plan contained in Section 22.905 is the basic scheme for the original compatible analog cellular technology. In addition to listing frequencies assigned for cellular service, and the separate "A" and "B" blocks, Section 22.905 also divides each block into 416 paired 30 kHz channels, with 21 pairs designated as control channels. Alternative technologies

[18] The Commission should proceed directly to the adoption of rules, rather than issuing a further notice of proposed rulemaking. The *NPRM* gave the public specific notice that the Commission was soliciting comment on additional changes that it might adopt in this proceeding; Accordingly, Western's proposal is squarely within the scope of the *NPRM.* Moreover, it is well established that the Commission is entitled to adopt rules reflecting proposals made in comments or reply comments (or even *ex parte* filings) that are within the general scope of the notice. *See Association of Battery Recyclers, Inc. v. EPA,* 208 F.3d 1047, 1058-59 (D.C. Cir. 2000), and cases cited therein.

are exempt from this channelization plan. The NPRM seeks comment on its proposal to amend Section 22.905 of the rules by removing the channelization plan and rewording the remainder of that section such that sets forth only which portions of the electromagnetic spectrum are allocated to cellular radio service.[19]

Western supports the Commission's proposal to remove the channelization plan. Western agrees with the Commission that market forces and industry standards should suffice to cause CMRS carriers to continue to deploy systems that provide nationwide operating capability. Further, because the older analog technology is widely in place, there should be no risk in decreasing cellular technical capability by removing the plan.

B. Modulation Requirements and In-band Emissions Limitations

The NPRM considers eliminating the OET 53 cellular compatibility requirements. Section 22.915 of the rules provides that cellular systems must be capable of providing service using the modulation types described in the OET 53 analog compatibility specifications. Consistent with its policy concerning PCS, the Commission proposes to remove the requirement that cellular systems have the capability to provide service using the modulation types described in OET 53. In addition, the Commission recommends the elimination of all rules governing audio filter and deviation limiter performance, modulation levels, and in-band radio frequency emission limits. Because the Commission is also proposing to remove the channelization requirements, it also is considering removing the rule requiring analog emissions be transmitted only on communications channels.

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19 *NPRM* at ¶ 37.

With respect to the out-of-band emissions, the NPRM proposes retaining these limits, but invites comment on whether it should provide both cellular and PCS licensees flexibility to establish a different limit, provided that all potentially affected parties contractually agree to the practice. Finally, the Commission seeks comment on whether it should adopt detailed requirements governing equipment setting and procedures to be used in certifying transmitting equipment for use in other services. The Commission proposes to harmonize out-of-band emissions limits for cellular and PCS to be consistent with its Wireless Communications Service rules[20].

Western agrees with the Commission's plan to eliminate the requirement that cellular systems have the capability to provide service using modulation types described in OET-53. Western also supports the proposal to remove rules governing audio filters and deviation limiter performance, modulation levers, in-band radio frequency emission limits, and the rules requiring that analog emission be transmitted only on the communication channels. Finally, Western agrees that the Commission should retain its out-of-band limit definition. Western believes that the elimination of these rules is consistent with the Commission's policy concerning PCS and will allow greater flexibility to carriers.

C. Wave Polarization Requirement

Section 22.367(a)(4) of the Commission's rules provides that electromagnetic waves transmitted in the Cellular Radio Services must be vertically polarized. This rule's original purpose was to promote technical compatibility as well as to protect broadcast television reception on the upper UHF channels (60-69).

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[20] *NPRM* at ¶¶ 39, 40.

In 1998, Andrew Corporation filed a petition for rulemaking requesting that the Commission amend Section 22.367 to allow the use of polarized diversity antenna arrays. In its petition, Andrew argued that the use of polarized diversity antenna rays have a number of economic and technical benefits. The Wireless Telecommunications Bureau ("WTB") denied the petition, choosing to address the issue during this Biennial Review Rulemaking proceeding.

In the NPRM, the Commission tentatively concludes that it should relax this requirement in Section 22.367.[21] Western agrees with the Commission's proposal to amend this section of the rules. As GTE expressed in earlier comments, the elimination of the wave polarization requirement could reduce carrier antenna costs, allow efficient use of antenna sites, promote regulatory parity and create more aesthetically pleasing antenna sites.[22] Moreover, use of polarization diversity will allow carriers to provide better service to handheld cellphones, in particular. The polarization rule was adopted when most cellular units were vehicular, with fixed, external, vertically polarized antennas. Handheld units, which have since become ubiquitous, are often used when their antennas are not vertically aligned. As a result, vertical wave polarization at the base station may provide less than optimal service to handheld cellphones. Many carriers use base station receive antennas designed to improve reception from these units through polarization diversity or elliptical polarization. The employment of similar techniques at the base station transmitting antennas requires elimination of the vertical wave polarization requirement.

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21 *NPRM* at ¶ 47.

22 *NPRM* at ¶ 46.

D. Assignment of Systems Identification Number

System Identification Numbers ("SIDs") are used by cellular telephones to determine their roaming status and by cellular systems to identify the home system of a cellular telephone. SIDs are currently a term of cellular authorization and may be modified by filing a notification with the Commission.

In the *NPRM*, the Commission explains that the current cellular SID rules are unnecessary and that there is no public policy reason that SIDs must be a term of Cellular Radiotelephone Service authorizations.[23] The Commission proposes to amend Section 22.941 accordingly, but it will retain the rule that a cellular carrier may only transmit a SID if that other system consents. Western supports the Commission's proposal and believes that an industry organization, such as CIBERNET, could effectively carry out SID coordination functions.

E. Incidental Service Rules

Under the current rules, Section 22.323 expressly authorizes cellular carriers to provide other communications services incidental to the public mobile service if certain conditions are met. Section 22.323 permits the use of incidental services provided that: (1) the costs and charges of subscribers not wishing to use incidental services are not increased as a result of the carrier's provision of incidental services to other subscribers; (2) the quality and availability of primary public mobile service does not materially deteriorate; and (3) provision of such incidental services is consistent with the Communications Act or the Commission's rules and policies. [24]

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23 *NPRM* at ¶ 50.

24 *NPRM* at ¶ 59.

The *NPRM* concludes that the three conditions mentioned are no longer necessary. Western supports the Commission's proposal. Western agrees with the Commission's conclusion that the first two conditions are unnecessary because the competitive wireless environment, gives consumers the option of changing to another competitive carrier. The third condition should also be deleted because it is unnecessary to remind carriers of their obligation to comply with the Act and the Commission's rules and policies.

The Commission also invited comment on whether it should retain the remaining portion of Section 22.323. The Commission recognizes that the rule may no longer be necessary in the current marketplace. Western would recommend retaining an express rule permitting incidental services. Western has found this rule as helpful in demonstrating to state and local governments that certain services provided should be treated as CMRS and are therefore exempt from state and local regulations.

F. Cellular Anti-Trafficking Rules

The Commission originally adopted cellular anti-trafficking rules to prevent speculation and trafficking in cellular licenses during a time when the Commission awarded mutually exclusive applications by lottery. Because mutually exclusive applications are now resolved by the competitive bidding procedure, the *NPRM* suggests eliminating or substantially modifying Sections 22.937, 22.943, and 22.945 anti-trafficking rules.[25]

Particularly, Section 22.937 requires an applicant for a new cellular system to make a demonstration of financial qualifications, at the time of application, to construct and operate a cellular system for one year. The Commission believes that this rule is no longer needed, as

[25] *NPRM* at ¶ 66.

there are two authorized cellular carriers in all cellular markets, and mutually exclusive applications for unserved areas are subject to competitive bidding.

Section 22.943 limits assignments and transfers of cellular authorizations and provides that such assignments are subject to the anti-trafficking provisions. The principal reason for this rule is to prevent speculation and resale of cellular licenses. The *NPRM* proposes to substantially eliminate Section 22.943 since mutually exclusive applications are now resolved by competitive bidding.

Finally, Section 22.945 prohibits parties from having any direct or indirect interest in more than one application for authority to operate a new cellular system in the same cellular market. The Commission believes that this rule is obsolete now that mutually exclusive applications are resolved by competitive bidding. Western agrees with the Commission that these rules are obsolete and should be substantially eliminated. The so-called "greenmail" and "trafficking" rules were largely ineffective at preventing opportunistic filings and are unnecessary now that auctions are used.

III. WESTERN OPPOSES THE SUBSTANTIVE RULE CHANGE PROPOSED AS A "CLARIFICATION" REGARDING THE DETERMINATION OF SERVICE AREA BOUNDARIES AND CELLULAR GEOGRAPHIC AREAS

Section 22.911(a) of the rules sets forth the standardized method of determining the cellular geographic service area ("CGSA"). The Commission, however, permits cellular licensees to apply for a modification of its licensed CGSA if it believes that the standard method produces a value that is substantially different from its actual coverage area. The Commission proposes to "clarify" that the 32 dBμV/m contour that is used when preparing an alternative CGSA determination under Section 22.911(b) is not the same as the service area boundary or SAB. The Commission believes that, on occasion, "licensees erroneously … believe that they

may employ alternative methods to determine an SAB," and takes the position that the SAB should always be computed in accordance with the formula set forth in Section 22.911(a).[26]

Section 22.911(b) provides a method for establishing a different 32 dBμV/m contour for purposes of defining CGSA. In particular, Section 22.911(b)(1) provides for determining the SAB along each of the eight radials in accordance with an alternate method, and Section 22.911(b)(3) states that

> The provision for alternative CGSA determinations was made in recognition that the formula in paragraph (a)(1) of this section is a general model that provides a reasonable approximation of coverage in most land areas, but may substantially under-predict or over-predict coverage in specific areas with unusual terrain roughness or features, and may be inapplicable for certain purposes, *e.g.,* cells with a radial distance to the SAB less than 8 kilometers (5 miles). In such cases, alternative methods that utilize more specific models are appropriate. . . .

This is consistent with the rationale expressed when the rule was adopted. The Commission specifically acknowledged that because the formula is not always an accurate predictor of reliable service, alternative methods should be used under "unique or unusual circumstances, or where the formula approach is clearly inapplicable."[27]

The proposed "clarification" would require that the formula in Section 22.911(a) be used exclusively for determining SABs, even under circumstances where the formula substantially over- or under-estimates real-world reliable coverage and where the assumptions underlying the formula are plainly inapplicable. The "service area boundary" resulting from use of the formula in such cases is not representative of anything and is not a basis on which the Commission should be making determinations of a carrier's coverage.

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[26] *NPRM* at ¶ 22.

In short, the "clarification" is anything but a clarification. It represents a departure from the express terms of the rule and the reasons for it. This rule change would preclude licensees from using Section 22.911(b) to establish different SABs based on actual propagation conditions that do not match the assumptions underlying the formula. As a result, the rule change would not permit the use of reality-based SABs for purposes of determining SAB extensions or for traffic capture protection.

Western strongly opposes this rule change. First, the Commission has not offered any rationale for proposing to prohibit computing the SAB to be computed in a way that accurately describes actual coverage. There is no basis for using the theoretical formula-based 32 dB V/m contour for determining subscriber capture or SAB extensions when actual coverage does not extend into the adjacent market. For example, a proposed cell's formula-based contour might extend into an adjacent market, but due to intervening terrain (*e.g.,* a mountain range), actual 32 dB V/m coverage might fall well short of the market boundary. The carrier should not be required to obtain the adjacent licensee's consent to a contour extension if the contour will not extend over the line. The adoption of the proposed rule change, misdescribed as a "clarification," would effectively give adjacent licensees a veto power over providing reliable, non-interfering service within the market but near the boundary.

CONCLUSION

For the reasons set forth above, Western generally agrees with many of the Commission's proposals. Western urges, however, that the Commission consider modifying its unserved area

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[27] *Unserved Areas in the Cellular Service,* CC Docket 90-6, *Second Report and Order,* 7 F.C.C.R. 2449, 2455 (1992), *recon. denied,* 8 F.C.C.R. 1363 (1993), *aff'd sub nom. Committee for Effective Cellular Rules v. FCC,* 53 F.3d 1309 (D.C. Cir. 1995).

procedures. Eliminating the current unserved area rules, and adopting a regulatory approach akin to PSC and SMR, would best serve the public interest. By embracing this approach, the Commission would be fulfilling its commitment to regulatory symmetry. In addition, it would promote administrative efficiency and would provide the incentive of encouraging extensive and complete coverage in unserved areas.

Respectfully submitted,

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